CHERN YEE FANG

v.

HO YEN TENG

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[DIVORCE PETITION NO: KG 5/94/11]
3 FEBRUARY 1997

FAMILY LAW*: *Divorce - Matrimonial property - Division of property - Jointly acquired - Substantial financial contribution to - Law Reform (Marriage & Divorce) Act, 1976, s. 76

This was an application for ancillary reliefs made pursuant to a divorce petition. In her application for ancillary reliefs, the petitioner applied to the Court, *inter alia*, that the respondent transfer to her ½ share or other share as may be determined of their matrimonial house ('the house') and to return to her the RM48,521.40 ('the monies') borrowed by the respondent from the petitioner.

The house was purchased by the respondent in 1979 for RM90,000. The respondent paid a downpayment of RM30,000 and the balance RM60,000 was borrowed from the bank. The loan was not settled at the time the respondent married the petitioner in 1986.

In her claim for a share of the house, the petitioner relied on s. 76(3), (4) and (5) of the Law Reform (Marriage & Divorce) Act, 1976 ('the Act') and prayed that in view of her contribution to the improvement of the house, she be paid a sum equivalent to her ½ share in the house. This was because the Public Bank had taken action to auction the house, to realize the loan in financing the house.

In her claim for the return of the monies, the petitioner had proved that she had made three separate payments to the respondent which she contended were made at the request of the respondent to service the bank facilities taken by the respondent for the house. This was disputed by the respondent who claimed that the monies were received by the respondent for the petitioner's business ie Sparkleen Sdn. Bhd.

Held:

[1] Section 76 (3), (4) and (5) of the Law Reform (Marriage & Divorce) Act 1976 did not define the matrimonial assets over which the Court had the power of division. It required the Court to differentiate between those assets acquired by joint efforts from those acquired by sole effort. In the case of assets acquired by joint effort the Court was directed to incline

towards equality of division while in the case of assets acquired by sole effort the Court was directed to ensure that the 'acquirer' shall get a greater proportion.

[2] Under the circumstances of the case, the Court treated the house as not a part of the matrimonial assets. Clearly, it was an asset owned before the marriage by one party i.e. the respondent. The issue as to whether the petitioner was entitled to a share of the house under the circumstances depended on whether s. 76(5) of the Act was applicable. Applying the Singapore case of *Koh Kim Lan Angela v. Choon Kian Haw and Another* which decided on s. 106(5) of the Women's Charter (Cap. 353) (which is *in pari materia* to s. 76(5) of the Act), the Court held that there were two requirements to be fulfilled, namely, substantial improvements in the assets during the course of the marriage, and that the source of that improvement should be the wife's effort or the joint efforts of the husband and wife.

[3] On the facts of the case, the Court found that there was no doubt that the house had substantially improved in value during the marriage of the petitioner and the respondent because it was acquired for RM90,000 in 1979 and the respondent was able to obtain refinancing of the house sometime between 1990 and 1992 for a sum of RM200,000 by Public Bank Berhad.

[4] As to whether the source of the improvement to the house could be said to have been contributed by the wife's effort or the joint efforts of the husband and wife, the Court noted that the respondent was still servicing the loan to the house during the tenure of his marriage to the petitioner. During their marriage, for a period of about 6 to 7 years, they were staying in Brunei and the rentals in respect of the flat which they resided together with the other outgoings including telephone, electricity and water bills were paid for by the petitioner. The house was let out and the rental collected by the respondent was used in the servicing of the house loan. These contributions from the petitioner would inadvertently assist the respondent to continue with the repayment of the loan in respect of the house or for that matter lessened the respondent's burden in servicing the loan.

[5] On the facts of the case, the Court found that clearly, the house was an asset owned by the respondent before the marriage and due to the substantial improvement in the value of the house by the joint efforts of the husband and wife, the house was amenable to division by the application of s. 76(5) of the Act.

[6] Following the Court of Appeal case of *Ching Seng Wah @ Ching Song Huat v. Lim Shook Lin,* the Court held that although the property was purchased by the husband before the marriage, it cannot be correct to say that s. 76(3) of the Act did not operate because it was not an asset acquired during marriage. Once the the house became the matrimonial house, its increase in value, for the duration of the marriage, is an asset acquired by their joint efforts.

[7] In the circumstances, the respondent was ordered to pay to the petitioner RM65,000 equivalent to 1/3 share in the house. This amount conservatively represented the petitioner's contribution in the form of rentals and other outgoings paid by her.

[8] As for the petitioner's application for the return of monies, s. 76 of the Act made no such allowance for such an application. As the petitioner had failed to prove that the loan was for repayment of the housing loan or for servicing thereto, the Court had no jurisdiction to hear this application. Applying the principles enunciated in the Singapore High Court case of *Chong Li Yoon v. Soo Yook Thong* the Court held that loans to the respondent and the respondent's liability to repay the petitioner are matters in the law of contract and not the law of husband and wife. Accordingly, the petitioner's application for the return of the monies was dismissed.

[Application dismissed.]

Cases referred to:

Joint Petition of Heng Peng Hoo @ Heng Peng Choon and Goh Ah Moy @ Goh Hooi Kheng (F) [1989] 2 CLJ 833 ***(refd)***
Watchel v. Wacthel [1973] All ER 829 ***(refd)***
Lim Tian Hock Vincent v. Lee Siew Kim Virginia [1991] 1 MLJ 274 ***(refd)***
Tan Kim Hong v. Keng Heng Investments Pte. Ltd. & Anor. [1991] 1 MLJ 399 ***(refd)***
Koh Kim Lan Angela v. Choon Kian Haw and Another Appeal [1994] 1 SLR 22 ***(foll)***
Ching Seng Wah @ Ching Song Huat v. Lim Shook Lin (P) [1997] 1 AMR 214 ***(foll)***
Chong Li Yoon v. Soon Yook Thong [1993] 3 SLR 181 ***(foll)***

Legislation referred to:

Law Reform (Marriage & Divorce) Act 1976, s. 76, (3), (4), (5)
Matrimonial Proceedings and Property Act 1970 [UK], s. 37
Women's Charter (Cap. 353) [Sing], s. 106(5)

For the petitioner - Baru Bian; M/s. Baru Bian Advoc., Kuching
For the respondent - Bernard Philip; M/s. Detta Samen & Co. Advoc., Kuching

JUDGMENT

Muhammad Kamil Awang J:

This divorce petition was filed by the petitioner in January 1994 on the ground that the marriage has broken down irretrievably. By a notice of application filed on 6 June 1994, the petitioner also applied for ancillary reliefs.

The parties were married on 22 January 1983. In the course of their marriage, they have stayed at various places including Brunei, Limbang, Kuching and Labuan. In 1986, the petitioner gave birth to a child who is now staying with the petitioner in Kluang, Johor. The respondent is currently residing in Labuan.

At the hearing of this divorce petition, both parties agreed to the dissolution of their marriage. In furtherance thereto and also by the consent of both parties, the petitioner was granted custody of their only child with reasonable access given to the respondent. In respect of the child's support, the respondent agreed to contribute a sum of RM400 monthly, exclusive of educational fees.

In her application for ancillary reliefs, the petitioner applied to the Court, *inter alia,* that the respondent do cause to be transferred to her ½ share or other shares as may be determined, all the parcel of land situate at No. 12, Metro Garden, Jalan Batu Kawa, Kuching, known as Lot 1656, Block 218-B, Kuching North Land District (the said house) and the return of RM48,521.40 borrowed by the respondent from the petitioner. Both the abovesaid issues were contested by the respondent.

Learned Counsel for the petitioner, Mr. Baru Bian, submits that although the petitioner did not contribute to the purchase of the said house, the petitioner had made contributions which, as stipulated under s. 76(4) of the Law Reform (Marriage & Divorce) Act 1976 (hereinafter called 'the Act'), the Court shall have regard to the following factors: (a) the extent of the contribution by looking after the house or caring for the family, and (b) the needs of the minor children, if any, of the marriage. The petitioner has established through her testimonies in Court and documentary evidence the following uncontroverted facts that:

(i) while the parties lived in Brunei, the said house was rented out to a third party for monthly rental of RM500, which rents were collected by the respondent;

(ii) while living in Brunei for about 6-7 years the petitioner was paying for the monthly rental of their flat at B$400, and the water and electricity bills. This means she had paid B$33,600 (B$400 x 12 x 7) in rents, not including the bills for water and electricity.

(iii) after the birth of her child, the petitioner became full time housewife, and looking after the child for 2 years.

Further, the petitioner's domestic services to the respondent, the upbringing and general care towards the child are contributions which cannot be quantified in money. He cited in support the case of *Joint Petition of Heng Peng Hoo @ Heng Peng Choon and Goh Ah Moy @ Goh Hooi Kheng (f)* [1989] 2 CLJ 833.

The petitioner had proved that she had made three separate payments to the respondent as follows:

On 12 December 1984 – a sum of RM18,515 (Exh. P1)

On 11 July 1986 – a sum of RM12,000 (Exh. P2)

On 22 May 1987 – a sum of RM18,006 (Exh. P3)

It is the petitioner's contention that these payments were made at the request of the respondent "to service the bank facilities taken by the respondent for the said house to save on interest which was then too high". The respondent admitted the receipt of the money but maintained that these were received by the respondent for the petitioner's business, i.e. Sparkleen Sdn. Bhd. This appears to be incorrect because the payments, Exhs. P1, P2 and P3, were made directly to the respondent in his personal name, and not in the company. At the material time the respondent admitted that he was having problems with his facilities until today, and the Bank had taken legal action to auction the said house.

The petitioner prays that in view of the petitioner's contributions to the improvement of the said house, she be paid a sum equivalent to her ½ share in the house. This is because the Public Bank is taking action to auction the said house, to realise the loan in financing the said house.

Learned Counsel, Mr. Bernard Philip, has not much to say about the case for the respondent and in his submission, he said that the said house was acquired solely by the respondent before marriage and as such s. 76 of the Act is not applicable. Under s. 76(5), there was no evidence adduced by the petitioner that the said house had been improved during the marriage. Therefore the petitioner is not entitled to a share of the house at all.

As to the loan made to the respondent by the petitioner, it was not a loan because the money was meant for the paid up capital of Sparkleen Sdn. Bhd. There is no evidence in support of this. The rental of the house was not pleaded in the petitioner's statement of claim, and there is no evidence in support of the petitioner's claim.

The respondent's case is imprecise as much as it is threadbare. As a matter of fact, Mr. Bernard Philip had not dwelt fully on the interpretation and the meaning of s. 76 of the Act as he perceived it, let alone to give an intellectual discussion and analysis thereof. In short, the respondent's case was simply a mere denial that s. 76 is inapplicable, devoid of any merit whatsoever. It is of no help, and therefore the Court will not take his submission seriously.

The Law

The application for ancillary reliefs was made pursuant to s. 76 of the Law Reform (Marriage and Divorce) Act 1976. Subsections (3), (4) and (5) of s. 76 provides:

> (1) ...
>
> (2) ...
>
> (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (4) In exercising the power conferred by sub-s. (3) the court shall have regard to -
>
> (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the house or caring the family;
>
> (b) the needs of the minor children, if any, of the marriage;
>
> and subject to those considerations the court may divide the assets or the proceeds of sale in such proportions as the Court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.
>
> (5) For the purpose of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

The section does not define the matrimonial assets over which the Court has the power of division. It requires the Court to differentiate between those assets acquired by joint efforts from those acquired by sole effort. In the case of assets acquired by joint effort the Court is directed to incline towards equality of division while in the case of assets acquired by sole effort the Court is directed to ensure that the 'acquirer' shall get a greater proportion.

The section lists out several factors which should be considered before the Court is to order a division, which approach is either the equality guideline or the greater proportion guideline. However, the factors are not exactly the same in both cases; in particular the 'contribution made to the welfare of the family by looking after the house or caring for the children' is a factor for consideration in the case of assets solely acquired by the other spouse.

The Matrimonial Assets

The respondent says the said house was purchased in 1979 for RM90,000. He claims that he paid RM30,000 as downpayment. There is no evidence as to where he got this money. The balance RM60,000 was borrowed from the bank. There is no evidence of the terms and conditions of the loan, especially the duration of the loan and the rate of monthly instalments payable. What is clear is that the loan was not settled at the time when he married the petitioner in 1986. There is no evidence on the earning power of the respondent or the petitioner; and in the latter it is reflected by her conduct, in the maintenance of a flat in Brunei and looking after the outgoings and needs of the family. There was the Sparkleen Sdn. Bhd. registered in the petitioner's name and nothing was disclosed in evidence at the trial or otherwise, that the company is the family concern. In the circumstances the Court treats it as not a part of the matrimonial assets.

The Act does not define what matrimonial assets are. The phrase 'matrimonial assets' is not a term of art and, in any case the closest that one can get to a description of the term would be Lord Denning's remark in *Watchel v. Wacthel* [1973] All ER 829 that '(t)he phrase "family assets" is a convenient short way of expressing an important concept. It refers to those things which are acquired by one or the other or both of the parties, with the intention that there could be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole ... The family assets can be divided into two parts: (i) those which are of a capital nature, such as the matrimonial home and the furniture in it, and (ii) those which are of a revenue producing nature, such as the earning power of the husband and wife.'

The remark does, however, indicate how broad the two terms can be. See the cases of *Lim Tian Hock Vincent v. Lee Siew Kim Virginia* [1991] 1 MLJ 274 and *Tan Kim Hong v. Keng Heng Investments Pte. Ltd. & Anor.* [1991] 1 MLJ 399.

In the present case, the said house which is claimed by the petitioner was purchased by the respondent in 1979, some four years before their marriage. According to the respondent, the said house was acquired with an initial

payment of RM30,000 and the balance of RM60,000 was financed through a bank loan. The bank loan had not been settled by the time of their marriage. Clearly, this is an asset owned before the marriage by one party i.e. the respondent. The issue as to whether the petitioner is entitled to a share of the said house under the circumstances depends on whether s. 76(5) of the said Act is applicable. There are very few cases on this point.

In the case of the *Joint Petition of Heng Peng Hoo @ Heng Peng Choon (supra),* where the petitioner applied for ½ share of the matrimonial home under s. 76 of the Act, the Court, having observed that there are no reported local decision on this issue and that s. 76 was not modeled entirely on s. 37 of the English Matrimonial Proceedings and Property Act 1970, decided to apply solely the s. 76 of the Act to the case. Here the petitioner had failed to show she had actually contributed to the maintenance and renovation of the matrimonial house; the matrimonial house was acquired solely by the respondent. However the Court was inclined to grant the application under s. 76(3) on the ground that the petitioner as a wife had rendered her domestic services to the respondent and towards the welfare of the family, and the need as a wife and to the children of the marriage. These are contributions which cannot be quantified in money. In exercising its discretion, the Court is not ordering the division of assets, for to do so will be inequitable and cause great hardship to the respondent. As the petitioner was financially well off and owned a house of her own, the Court ordered a lump sum payment of RM10,000 to the petitioner.

In the Singapore's case of *Koh Kim Lan Angela v. Choon Kian Haw and Another Appeal* [1994] 1 SLR 22 where a similar issue of this nature was raised, the Court of Appeal held that:

> It will be seen from the words of the Statute that there are two requirements: substantial improvements in the assets during the course of the marriage, and that the source of that improvement should be the wife's effort or the joint efforts of the husband and wife.

The relevant section of the Statute in Singapore is s. 106(5) of the Women's Charter (Cap. 353) which *in pari materia* to our s. 76(5) of the said Act herein. In the present case, according to the respondent, the said house was re-financed sometime between 1990 and 1992 for a sum of RM200,000 by Public Bank Berhad. There is no doubt that the said house had substantially improved in value during their marriage because it was acquired for RM90,000 in 1979 and the respondent was able to obtain refinancing of the said house for RM200,000.

The next requirement is whether the source of the improvement to the said house could be said to have been contributed by the wife's effort or the joint efforts of the husband and wife. In this context, it is pertinent to note that the respondent was still servicing the loan to the said house during the tenure of their marriage. During their marriage, for a period of about six to seven years, they were staying in Brunei and the rentals in respect of the flat which they resided together with the other outgoings including telephone, electricity and water bills were paid for by the petitioner. The petitioner paid B$400 (RM640 equivalent @ 1.6) each month for keeping of the house and the family in Brunei which means (RM640 x 12 x 7 = RM53,760) was spent on rents excluding the water, electricity and other charges. This was not disputed by the respondent. This means that the respondent was relieved of the burden of looking after the family and the family needs, which left the respondent free to service the loan with the bank. The petitioner testified that the house was let out at RM500 per month, which rent was collected by the respondent and this helped the respondent in the servicing of the house loan. This too is not disputed by the respondent. These contributions from the petitioner would inadvertently assist the respondent to continue with the repayment of the loan in respect of the said house or for that matter lessened the respondent's burden in servicing the loan.

The petitioner's contributions herein in no small measure assured that the respondent was able to continue with the instalment payments in respect of the loan taken on the said house. Since the said house was re-financed by Public Bank Berhad and after the break-down of their marriage, the respondent admitted that he had problem servicing the loan taken subsequently. Clearly, the said house is an asset owned by the respondent before the marriage and due to the substantial improvement in the value of the said house by the joint efforts of the husband and wife, the said house is amenable to division by the application of s. 76(5) of the said Act. In *Koh Kim Lan Angela v. Choon Kian Haw and Another Appeal (supra)* it was held that:

> In our view, provided there has been substantial improvement by the joint efforts of the husband and wife, the actual extent of the wife's effort can be reflected in the quantum and percentage of the asset she is awarded. The fact that her contribution to that particular asset is small does not bar her entitlement completely.

In the exercising of the Court's discretion to make the relevant order under s. 76(3) of the said Act in respect of the said house, the Court should take cognizance of the respondent's admission that he had defaulted on the loan repayment and Public Bank Berhad are in the process to auction the said house.

In a very recent case of *Ching Seng Wah @ Ching Song Huat v. Lim Shook Lin (P)* [1997] 1 AMR 214, the Court of Appeal held that although the property was purchased by the appellant (husband) before the marriage, it cannot be correct to say that s. 76(3) of the Act did not operate because it was not an asset acquired during marriage. Once the house becomes the matrimonial house, its increase in value, for the duration of the marriage, is an asset acquired by their joint efforts. Shankar JCA said (p. 235):

> Once the house became the matrimonial house, its increase in value for the duration of marriage is an asset acquired by joint effort.

His Lordship adopted the liberal approach, and he said further:

> I would with respect adopt with approval the liberal approach by Thean J in *Shirley Koo v. Kenneth Mok Kong Chua* [1989] 2 MLJ 264 where the purchase by the wife of kitchen cabinets, crockery, pots and pans and the payment of servant's salary, food in grocery bills were all added up as her contribution to a semi-detached terrace house which the husband claimed he had solely acquired because he alone had paid for it. From the time she began to live in it the wife in our case kept the house, and maintained and serviced it as a going concern. Its value appreciated from RM29,000 to RM175,000 partly as a result of her efforts also.

It was held that the respondent was to be paid 1/3 share of the proceeds of sale of the matrimonial house.

Therefore in the circumstances, it would only be fair to both parties that the respondent pay to the petitioner RM65,000 equivalent to 1/3 share in the said house. This sum of RM65,000 would conservatively represent her contributions in the form of rentals and other outgoings as abovementioned.

Loan

As for the petitioner's application for the return of RM48,521.40 a sum which the petitioner alleged was borrowed by the respondent from her, s. 76 of the said Act make no such allowance for such an application. The petitioner alleged that the sum loaned to the respondent for the purpose of servicing the house loan. The respondent admitted that he had accepted the sum from the petitioner but the loan was used for the capital investment in Sparkleen Sdn. Bhd., a firm owned by the petitioner. There is no evidence to show that the loan was made use of by the respondent for the purpose of repayment of the housing loan or for servicing the said loan. As the petitioner has failed to prove that the loan was for repayment of the house loan or for servicing thereto, the Court has no jurisdiction to hear this in an application for ancillary relief. In a similar application for repayment of a loan under ancillary matters in a divorce petition, the High Court in Singapore in *Chong Li Yoon v. Soo Yook Thong* [1993] 3 SLR 181 held that:

> Loans to the respondent and the respondent's liability to repay the petitioner are matters in the law of contract not the law of husband and wife.

The High Court enunciated further on this matter and held that:

> If there are liabilities between the husband and the wife under contract or quasi contract (or restitution), the proper and only remedy is for a separate action and not to involve the jurisdiction of this Court in a matrimonial proceeding ...

In the circumstances and applying the principle as enunciated herein, the application for the return of RM48,521.40 is hereby dismissed.

In the light of the orders granted by the Court, the petitioner is to be given half the cost of this application. Orders accordingly.

Reported by Ling Hea Hoon